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Supreme Court of the United States

October Term, 1959

No. 882

MAX WINZELBERG, an Individual,
Petitioner,

v.

R. K. BAKING CORP. and BAKERY & PASTRY DRIVERS AND HELPERS UNION, LOCAL NO. 802, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents,

and

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM B. ROTHSCHILD,
113 West 42nd Street,
New York 36, New York,
Attorney for Respondent,
R. K. Baking Corp.

PHILIP SMITH,
of Counsel,
152 West 42nd Street,
New York 36, N. Y.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

R. K. Baking Corp., named Respondent in a Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit filed by one Max Winzelberg, hereby enters its opposition to said Petition and respectfully prays that the Petition for a Writ of Certiorari be denied for the reasons set forth below.

Questions Presented

1. Does an individual who originally filed unfair labor practice charges with the National Labor Relations Board but was not, under the statutory scheme of the National Labor Relations Act, a party to enforcement proceedings in the Court of Appeals, have standing to petition for a Writ of Certiorari?

2. Does the decision below involve any conflict with decisions of other Courts of Appeals; or pose an important question of federal law; or conflict with applicable decisions of this Court so as to justify review by this Court?

3. Does the decision below so far depart from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision?

Statement

This litigation was commenced by Petitioner's filing of unfair labor practice charges against Respondent R. K. Baking Corp. and Respondent Local 802, International Brotherhood of Teamsters. After hearing a Trial Examiner issued a decision finding *inter alia* that the Respondents had violated the National Labor Relations Act by discriminatorily denying employment to Petitioner because of his lack of good-standing membership in Respondent union. These findings were subsequently appealed to the National Labor Relations Board, which upheld the findings.

The case was then brought before the Court of Appeals for the Second Circuit which upheld the Board's findings of discrimination, but overruled the Board's affirmative order insofar as it directed that the company offer a job to Petitioner and pay him back pay. The Board then petitioned for rehearing on the question of affirmative remedy, which the Court of Appeals granted by remanding the case to the Board for the purpose of determining what obligation, if any, the Respondents had toward Petitioner insofar as a job offer and back pay were concerned.

Thereafter, pursuant to this remand, a second hearing was commenced before a Trial Examiner who decided that Petitioner should be offered employment and paid back pay in the sum of $12,438.11. While an appeal on this decision was pending before the Board, the Board itself

again petitioned the Court of Appeals to enlarge the scope of the Court's previous remand order so as to permit the receipt of evidence on the issue of whether the original application for employment by Petitioner was really *bona fide* or was fraudulent in nature. The Court granted this enlargement.

A third hearing was then convened before a Trial Examiner who ruled against the allegations of fraud and recommended affirmance of the original decision of the Board. On appeal, the Board reaffirmed its original Order and directed the Respondent Company to offer Petitioner employment as a permanent route salesman and to pay him back wages in the sum of $12,438.11.

The Board again filed a Petition for Enforcement of this Order in the Court of Appeals. Named therein as parties was the National Labor Relations Board as Petitioner, and R. K. Baking Corp. and Local 802, International Brotherhood of Teamsters as Respondent. On December 24, 1959, the Court of Appeals rendered its decision from which this Petition for a Writ of Certiorari seeks review. In its decision, the Court again upheld the Board's findings of discrimination and affirmed the finding of lack of fraud in the original job application by Petitioner. The Court held, however, that the evidence did not warrant enforcement of the Board's order insofar as it directed the company to offer Petitioner permanent employment as a route salesman. Accordingly, the Court reduced the back pay award to the sum of $696.36, which represents the amount Petitioner would have earned had he been employed as a temporary replacement for six weeks in February and March of 1951. This sum of $696.36 has been paid to and received and accepted by the Enforcement Division of the National Labor Relations Board. It was for this job of temporary replacement that Petitioner originally applied, and it was this job which the Court held had been denied Petitioner because of his lack of good-standing membership in the Respondent Union.

ARGUMENT

I. Petitioner has no standing to file the instant Petition for a Writ of Certiorari.

The statutory scheme established by the National Labor Relations Act provides for public enforcement of the rights guaranteed workers, unions and employers therein. In this scheme, the Board is without authority to act unless and until charges of unfair labor practices are presented to it by the filing of a charge by an employee, union or employer. Thereafter, all procedural steps undertaken are directed and controlled by the Board alone. The first step following the filing of the charge is for the Board to conduct an investigation in order to determine whether there is any merit to the allegations of the charge. If the Board after due investigation determines there is no merit to the charge, the Board has the right to dismiss. Although N. L. R. B. procedure permits an administrative appeal from such dismissal to the General Counsel of the Board (Sec. 102.19, Rules and Regulations, National Labor Relations Board) there can be no court review from the Board's action in dismissing a charge. *Lincourt* v. *NLRB*, 170 F. 2d 306 (C. A. 1).

On the other hand, should the Board after its investigation determine that unfair labor practices have probably been committed, it is entrusted by the Statute (Sec. 10(b)), to institute formal proceedings against the company and/or union who appear to have violated the law. It should be noted that these formal proceedings are directed and controlled by various arms of the National Labor Relations Board. The formal complaint is issued by the General Counsel of the National Labor Relations Board and he has responsibility to prosecute the case before a Trial Examiner of the Board and then to the Board itself, if necessary. Thereafter, should the Board issue an affirmative order with which the respondents therein fail to comply, the Board

under Sec. 10(e) of the Act, has authority to petition a Court of Appeals for enforcement of its order. The Board is also given the power to insure compliance with an enforcement order of a Court of Appeals by instituting a contempt action against a non-complying Respondent.

In each of these various procedural steps, it is the Board as a public body which alone is given the authority to enforce the provisions of the National Labor Relations Act. The sole role played by a private party is to commence a Board investigation by the filing of unfair labor practice charges.

This Court and the Courts of Appeals for the various circuits have zealously protected this public character of the enforcement of the National Labor Relations Act. Thus, in *Amalgamated Utility Workers* v. *Consolidated Edison Co. of New York*, 309 U. S. 261, the Court denied the right of the union, who had originally filed the unfair labor practice charges, to institute contempt action against the Respondent employer for its alleged non-compliance with an enforcement order of the Court of Appeals. In so ruling, the Court observed at page 266 of its opinion that:

> "When the Board has made its order, the Board alone is authorized to take proceedings to enforce it * * * The Act gives no authority for any proceeding by a private person * * * to secure enforcement of the Board's order. The vindication of the desired freedom of employees is thus confided by the Act, by reason of the recognized public interest, to the public agency the Act creates."

Recognizing the public character of the rights created by the National Labor Relations Act, the Courts of Appeals have generally denied charging parties the right to petition for enforcement of a Board order, *Newspaper Publishers Assn.* v. *NLRB*, 190 F. 2d 45 (C. A. 7) and generally have not even permitted them to intervene in enforcement proceedings before the Court. *Haleston Drug Stores, Inc.* v.

NLRB, 190 F. 2d 1022 (C. A. 9); *Aluminum Ore Co.* v. *NLRB*, 131 F. 2d 485 (C. A. 7); *Stewart Ore Casting Corp.* v. *NLRB*, 132 F. 2d 801 (C. A. 7).[1]

The statute establishes only one exception to this general rule that all procedural steps after the filing of the charge are within the sole domain of the Board. Section 10(f) of the Act affords to the party filing the charge the right to obtain a review by a Court of Appeals of a decision of the Board adverse to him. However, the type of Board decision envisaged by this provision is a final decision after the issuance of a complaint and formal hearing. *Albrecht* v. *NLRB*, 181 F. 2d 481 (C. A. 7); *Kovach* v. *NLRB*, 229 F. 2d 138 (C. A. 7). Obviously the instant case does not fall within this one exception because Petitioner has not been aggrieved by an adverse decision against him by the Board but on the contrary, the Board through its own findings and appellate procedure before the Court of Appeals repeatedly has supported Petitioner's claims and desires. There can scarcely here be a showing that the Board has failed to carry out its full responsibilities, necessitating the seeking by a private party of review by a Court of Appeals, nor can one in the position of Petitioner who wishes the favorable decision of the Board to be reinstated, claim in any way that this decision is adverse to him. Accordingly, Petitioner's situation does not qualify for the one statutory exception noted *supra*.

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[1] Cf. *International Union* v. *Eagle Pitcher Mining & Smelting Co. and NLRB*, 325 U. S. 335. In that case this Court permitted the union who had originally filed charges to petition for certiorari in order to review the refusal of the Court of Appeals to remand the case for further proceedings to the Board. In that case, however, the union had been permitted to intervene in the Court of Appeals as a party. Furthermore, in any event, the Board appeared (although as a party Respondent) in support of the union's petition for certiorari. The public interest, accordingly, did correspond to the union's individual interest.

In all of the many procedural steps in this case as outlined *supra*, the Petitioner was never a party as such. At all stages his case was presented by attorneys for the Labor Board. Significantly, in the enforcement proceedings below, which brought the case on four separate occasions before the Court of Appeals, the Petitioner was not named as a party. Nor did Petitioner make any effort to intervene in any of these proceedings before the Court of Appeals. The Petitioner was content to put his claim in the Board's hands just as the statute provided. The Board, of course, pursued this case in vindication of the public rights involved. Concomitantly, Petitioner's rights of a private nature were affected. Now that these private rights have been threatened by the changed remedy provided by the Court of Appeals differing from the remedy determined by the Board, Petitioner now seeks judicial status to pursue his private claims irrespective of the fact that all public rights, with which the Act is concerned, have been protected and supported by the Court of Appeals' decision.

To permit Petitioner to maintain this Petition for a Writ of Certiorari at this stage in the proceedings would, in effect, override the Board's position as prosecutor of the public rights protected by the Act. If, as appears likely at this time, the Board in its wisdom decides to take no part in petitioning for a Writ of Certiorari in this case, such inaction must be construed as arising from at least two or more of the following reasons: there is no question here suitable for review by this Court (as we shall show *infra*) and the public rights arising in this case have been faithfully vindicated by the Court of Appeals, even though its remedy curtailed the private monetary disbursement ordered. Because of these reasons, the Board should properly call a halt to this lengthy action. To allow Petitioner to carry on in the face of the Board's silence would be tantamount by this Court to notifying the Board that it should not heed its own discretion and intelligence in closing a case when it has come to a successful conclusion from the

public viewpoint, and that if the Board does recognize the advisability of resting after a differing decision from an appellate court, this Court will subvert the Board's control by allowing a private party to proceed alone. Such result was never intended by Congress and should not be countenanced by this Court.

II. The decision of the Court of Appeals below does not conflict with decisions of other Courts of Appeals, does not pose an important question of federal law or conflict with other applicable decisions of this Court so as to justify review by this Court.

As the detailed and voluminous Petition for the Writ of Certiorari amply reveals, this case is entirely factual in nature. There is no issue of law or interpretation of the statute involved.

The applicable law is hornbook clear and not in dispute. Indeed at no time during this lengthy litigation was there ever any real legal issue involved. The only questions ever presented by this case at any stage are: (1) was Petitioner discriminatorily denied employment because of his lack of good standing membership in the union; (2) is Petitioner entitled to employment as a route salesman; and (3) how much back pay is Petitioner entitled to.

The first of these questions has been decided in the affirmative on two separate occasions by the Court of Appeals and is not in dispute here. The remaining two questions hardly raise a constitutional question or even any legal issue which should be considered by this Court. All that we have in this case at this point is whether one single individual is entitled to back pay in the sum of $696.36 or in the sum of $12,438.11, and whether this individual originally applied for a temporary or permanent position.

These factual issues have already been exhaustively considered by three Trial Examiners and by the Board and the Court of Appeals on two separate occasions. It has never been the position of this Court—fortunately for this and all other cases—that the interest of the country would be enhanced by a further intensive review of factual details in civil and administrative cases particularly by this Court after such thorough review below.

All litigation must ultimately be placed to rest and this case after ten years of existence is no exception.

III. The decision of the Court of Appeals below does not depart from the accepted and usual course of judicial proceedings so as to call for the exercise of this Court's power of supervision.

We think it clear that Petitioner has had his full day in court; indeed, he has had many full days in many "courts" in this case. At all stages his rights were certainly fully protected and zealously advanced by the Board.

The fact that the Court below differed in part as to the remedy ordered by the Board hardly constitutes a significant departure from the usual and accepted course of judicial proceedings so as to require the intervention of this Court. The Board, in brief, based its remedy on the finding that Petitioner had applied for a temporary job, and inferred therefrom that had Petitioner been granted that job, permanent employment would have followed. The Court of Appeals accepted the Board's findings on the extent of Petitioner's application but from the total record, was unable to draw the same inference therefrom that Petitioner would have been permanently employed after the temporary stint. Accordingly, the Court below did not arbitrarily or capriciously ignore any findings of the Board, as contended by Petitioner; on the contrary it supported these findings but found insubstantial evidence as a basis for the Board's

inference from these findings. This decision is clearly within the prerogative and responsibility of an appellate court and exemplifies no improper deviation deserving Supreme Court review.

CONCLUSION

For these reasons, on the law and without argument on the merits of the factual issues, we request respectfully that the Petition for a Writ of Certiorari be denied herein.

Respectfully submitted,

WILLIAM B. ROTHSCHILD,
113 West 42nd Street,
New York 36, New York,
Attorney for Respondent,
R. K. Baking Corp.

PHILIP SMITH,
of Counsel,
152 West 42nd Street,
New York 36, N. Y.

Dated: New York, New York,
May 18, 1960.